Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BRYAN G. HOLE and ERIC E. GONZALEZ,
Petitioners,

v.

TEXAS A&M UNIVERSITY; ROBERT GATES; DAVID PARROT; MICHAEL COLLINS; LAURA SOSH-LIGHTSY; and JACQUIE VARGAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD G. HOLE
Counsel of Record
I. CECILIA GARZA
HOLE & ALVAREZ, L.L.P.
612 W. NOLANA LOOP, SUITE 370
MCALLEN, TEXAS 78504
TELEPHONE: (956) 631-2891
ron@holealvarez.com

Attorneys for Petitioners

April 13, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890.5001

QUESTION PRESENTED FOR REVIEW

Whether attorney's fees can ever constitute a legally-cognizable injury under §1983.

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The decision of the court of appeals is not officially reported but is available at 2010 WL 148656 (C.A.5. (Tex.) January 13, 2010) and is reproduced in the Appendix herein at 1a-7a. The Memorandum Opinion and Order of the U.S. District Court for the Southern District of Texas - Brownsville Division is not published. However, a copy is reproduced in the Appendix at 8a-27a.

JURISDICTION

The Opinion and judgment of the court of appeals was issued on January 13, 2010. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was

violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Due Process Violations

During the Fall 2002 semester at Texas A&M University ("TAMU") and thereafter, Respondents, in their individual and/or official capacities, initiated, conducted and/or directly oversaw an investigation concerning the Parsons' Mounted Cavalry ("PMC"), a student organization at TAMU. Pet. App. 53a-58a. During such investigation, the Respondents in their individual capacities, violated Petitioners' (and those of other PMC students) rights under the United States Constitution. *Id.*

After the "investigation" was completed, late in the Spring 2003 semester, the Respondents in their individual capacities began an organized and concerted effort to rapidly conduct some seventy-seven student disciplinary hearings. Pet. App. 59a. Such hearings were conducted in a manner which ignored Petitioners' clearly established due process rights guaranteed them by the Fourteenth Amendment to the United States Constitution. *Id.*

For example, students were given very short notice of the inflexible hearing dates, which were held during "finals week." Pet. App. 60a-63a. The notices were generic and provided the Petitioners (and other involved students) no specifics as to the nature of the

charges against which they were to defend. *Id.* Additionally, Petitioners were told they had no right to have a representative of their own choice with them at the hearing; no right to consult with counsel; and no right to cross-examine the witnesses against them. *Id.* Furthermore, Petitioners were placed under a "gag order", and were forbidden from talking to potential witnesses, their parents or their attorneys; Petitioners were not advised of the identity of the witnesses against them; Petitioners were told that if they did not testify, they would be found guilty; secret, undisclosed, evidence was used against the Petitioners; guilt by association was utilized; students were disciplined for past conduct that was not proscribed at the time it occurred; students were sanctioned without substantial evidence; the Respondents that conducted the investigations and advised the University that violations had taken place, were designated as the hearing officers; no neutral fact-finders were afforded to the students; and predetermined punishments were imposed. *Id.* In short, Petitioners had no way of being prepared to defend themselves against the nebulous charges, and virtually no chance of continuing their education at TAMU.

As a result of Respondents' actions, in the days immediately prior to Petitioners' scheduled hearings, numerous PMC students were severely sanctioned by TAMU and Respondents. Pet. App. 68a-69a. Such severe sanctions included dismissals and suspensions from TAMU. *Id.* Prior to Petitioner Hole's hearing, of the 17 students similarly situated who had already had their hearings, 100% of those students were either given suspensions or separations from TAMU. *Id.* Additionally, both Petitioners were designated on a written memo as "Potential Separation", *prior* to their

hearings. *Id.* (Yet when Petitioners argued that had they *not* sued they would have been sanctioned, the Fifth Circuit characterized such argument as "speculative".)

B. The Actions Taken to Stop the Denials of Due Process

On April 25, 2003, hours before his hearing, in an effort to obtain the due process to which he was entitled, Petitioner Hole filed a petition in state court and sought a temporary restraining order ("TRO") to stop the unconstitutional hearings and sanctions. Pet. App. 9a. The state trial court found that the individual Respondents and TAMU had denied Petitioner Hole's clearly established statutory or constitutional rights, of which a reasonable person would have known, and found that if such actions were not immediately restrained, Petitioner Hole would suffer irreparable harm. *Id.* The state trial judge issued a TRO, restraining the University and its employees (including Respondents) from proceeding with the disciplinary proceedings, and restraining the University and its employees, including Respondents, from imposing sanctions against those students whose disciplinary proceedings had already been held. *Id.*

On or about August 13, 2004, after a lengthy evidentiary trial, a final judgment was entered in the state court action. Pet. App. 29a-49a. The trial court specifically found numerous due process violations, and permanently enjoined TAMU and its employees, including Respondents, from proceeding with the constitutionally–flawed investigations and hearings against Petitioners. Pet. App. 38a-39a. The trial court found that if the Respondents herein were not

enjoined, Petitioners would suffer irreparable harm and damages. *Id.* However, rather then comply with the state court rulings, and properly perform the investigations and properly conduct the hearings, TAMU appealed the final judgment. Pet. App. 3a.

C. The Filing of the §1983 Complaint

While the appeal was pending, Petitioners Bryan G. Hole and Eric E. Gonzalez filed their Original Complaint in the United States District Court for the Southern District of Texas – Brownsville Division, pursuant to 42 U.S.C. §1983, seeking to recover the economic damages they suffered as a result of the individual Defendants' unconstitutional actions. Pet. App. 3a. The basis for federal jurisdiction was 28 U.S.C. §1331.

At the time that Petitioners filed their Original Complaint, Petitioners were students in good standing at Texas A&M University, a state-funded university; Respondent Gates was President of Texas A&M University; and Respondents Parrot, Collins, Lightsy, and Vargas were employees of the Texas A&M University's Student Life Services. Pet. App. 53a.

D. The Dismissal of Federal Court Suit

On April 26, 2006, the judgment of the state court was reversed by a state appellate court (not on the merits). Pet. App. 3a. A Petition for Review to the Supreme Court of Texas was denied on February 23, 2007. *Id.*

On July 24, 2007, Petitioners filed Plaintiffs' First Amended Original Complaint. Pet. App. 50a-67a. In

response, Respondents filed a Rule 12(c) Motion to Dismiss and Brief in Support of Motion to Dismiss. Based almost exclusively on the fact that the state court suit was dismissed, the district court granted such motion. Pet. App. 3a-4a. The Fifth Circuit Court of Appeals affirmed the dismissal. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

The law in the Fifth Circuit prevents a claimant who is being denied due process by a person under color of law from recovering their damages under §1983, *if* those damages consist of the attorney's fees incurred to obtain due process. This is an important question of federal law that has not been, and should be, settled by this Court.

"Restoration of the pecuniary interest suffices to return a plaintiff to her prior circumstances." *Akin, Gump, Straus, Hauer & Feld v. National Dev. and Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009). "When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed." *Id.* (citing the Restatement (Second) of Torts §903 cmt. A (1977)).

In Plaintiffs' First Amended Original Complaint, Petitioners sued under §1983 (not §1988, as reported by the Fifth Circuit - Pet. App. 3a) to recover their damages including, but not limited to, the attorney's fees and expenses that were incurred by them in their effort to halt the violations of their due process rights. Pet. App. 64a. The damages (including attorney's fees) being sought by Petitioners are damages that were

directly sustained by the Petitioners as a result of the due process violations. They are *not* the attorney's fees incurred in connection with the prosecution of this civil action [which would be governed by § 1988], nor do they require a successful prosecution of the underlying action.

The attorney's fees and costs incurred to stop the unconstitutional actions are compensatory damages, and constitute an injury-in-fact because they were necessarily incurred to prevent further due process violations and to ensure that Petitioners received the due process protections guaranteed them by the United States Constitution.

It is fundamentally unjust that Petitioners, who have been financially damaged by Respondents' §1983 violations, should not be entitled to be compensated simply because their damages were in the form of attorney's fees. There is no doubt that if a due process violation required a claimant to seek the advice of a doctor, an accountant, an engineer or some other professional, the fees charged by such professional would, if caused by the violation, be recoverable.

The Fifth Circuit opinion allows for the disparate treatment of attorney's fees from other professional fees, and eviscerates Petitioners' opportunity for redress. In doing so, the Fifth Circuit has also ignored this Court's guidance that "[t]he recovery of such expenses unrelated to litigation would assuredly support Article III standing. . . ." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 (1998). However, the Fifth Circuit inappropriately applied this Court's holding in *Steel,* to justify its erroneous

dismissal, based solely on the pleadings, of Petitioners' §1983 claims for compensatory damages.

Although it recognized that the facts in the instant case differed considerably from the facts in *Steel* and *Lopez v. Houston Ind. Sch. Dist.*, No. 04-20604, 124 Fed.Appx 234, 2005 WL 176293 (C.A.5 (Tex.) July 28, 2004)(*not designated for publication*), the Fifth Circuit still relied on the general principle noted in those opinions that "a party who voluntarily initiates litigation and does not win a judgment, cannot then sue to recover attorney's fees as a compensable injury." *Hole v. Texas A&M University*, 2010 WL 148646 (C.A. 5 (Tex.) Jan. 13, 2010); Pet. App. 1a-7a.

The Fifth Circuit Opinion not only ignores the fact that the initiation of litigation was not voluntary (instead it was necessary to preserve Petitioners' civil rights), but also that Petitioners *did* obtain the relief sought, as the constitutionally-flawed processes were halted. Pet. App. 29a-49a.

As a result of the initiation of constitutionally-infirm disciplinary proceedings against Petitioners by Respondents, in their individual capacities, Petitioners had no choice but to use all means legally available to them to protect their constitutional rights to due process. They did this by filing an unrelated application for a temporary restraining order in a state court in Brazos County. Pet. App. 9a. Such application and litigation was successful in halting the continued deprivation of their due process rights, and it was alleged in the instant case that such actions prevented Petitioners' (and the remaining PMC students') lives and livelihoods from being

substantially destroyed by the one-sided sham hearings. Pet. App. 51a-67a.

Subsequent to the temporary restraining order, Petitioners were required to file applications for temporary and permanent injunctions in the state court action, in order to prevent the continuation of the individual Respondents' attacks upon Petitioners' basic constitutional rights. Pet. App. 9a-10a. Numerous depositions were taken in Brazos County and an extensive amount of discovery was conducted in order to protect Petitioners' rights from being denied by Respondents. All the while, the individual Respondents in their individual capacities maintained an indifferent attitude to the ongoing violations.

Respondent Gates (then-President of TAMU) noted that, even if he was convinced that the Petitioners' rights to due process were being violated, he would allow the process to continue. Even more disturbing is the fact that, once the state court found, without a doubt, that Respondents' conduct was unconstitutional, the Respondents failed to heed the judicial determinations, and the judgment was appealed, further damaging Petitioners. Pet. App. 3a.

At no time did such constitutionally-flawed proceedings continue, as Petitioners were successful in stopping them. In the instant case, had steps to obtain due process not been taken, Petitioners would have lost their careers as military officers, and would have lost their chosen livelihoods. However, they would have then, according to the Fifth Circuit, suffered an "injury-in-fact" upon which they could sue under §1983. When this was pointed out in briefing to the Fifth Circuit, it stated as follows:

> In addition, Appellants argue that the threat of disciplinary sanctions left them no choice but to sue. Appellants' argument assumes that Appellees' disciplinary process would inevitably have led to sanctions, and that these sanctions would have violated Appellants' constitutional rights. *This argument is speculative, and we do not accept it as true.*

Pet. App. 6a. (Emphasis added). (Even though 100% of the similarly situated students who underwent the process before it was halted received precisely those sanctions. Pet. App. 68a-69a.)

However, to survive a Rule 12(c) motion, a complaint must allege "sufficient factual matter, **accepted as true**, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)(emphasis added)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Clearly, any doubt should have been an issue for a trial. Petitioners have been denied their opportunity to demonstrate to a jury, as they did to the trial judge in state court, that this argument is *not* speculative. The Fifth Circuit Opinion deprives Petitioners of that opportunity because the Fifth Circuit does not accept Petitioners' allegations "as true."

Under Rule 12(c), "[t]he issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus a court should not dismiss a claim [under Rule 12(c)] unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove, consistent with the allegations in the complaint." *Great Plains Trust Co. v. Morgan Stanley*

Dean Witter & Co., 313 F.3d 305, 313 (5th Cir 2002). In short, the Fifth Circuit holds that, since *it* does not believe the allegation, Petitioners do not get a trial.

The Fifth Circuit evidently believes that Petitioners should have allowed these catastrophic events to have occurred, and unless they were allowed to occur, Petitioners would not have suffered an injury-in-fact. Petitioners did suffer injuries-in-fact – the damages they suffered which directly flowed from the individual Defendants' wrongful conduct in violation of Petitioners' constitutional rights, which include the attorney's fees, court costs and expenses incurred by Petitioners to protect their constitutional rights.

Citing *Steel* and *Lopez*, the Fifth Circuit Court of Appeals' Opinion correctly notes that Petitioners cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit. Petitioners agree. However, *Steel* and *Lopez* are inapplicable to the facts of this case. In *Steel*, the United States Supreme Court was faced with a private enforcement action alleging that the petitioner violated the EPRCA by failing to file toxic and hazardous chemical storage and emission reports. *Steel*, 523 U.S. at 86. The complaint in *Steel* specifically sought "an award of all respondent's costs, in connection with the investigation and prosecution *of this matter,* including reasonable attorney and expert witness fees, as authorized by Section 236(f) of [EPCRA]". *Id.* (emphasis added).

Unlike *Steel*, in the instant case Petitioners are <u>not</u> bringing their Section 1983 action in federal court to recover the costs of bringing their Section 1983 action. The Respondents, the District Court and the Fifth

Circuit Court of Appeals all fail to understand the fact that Petitioners are seeking to recover, as part of their *compensatory damages*, the attorney's fees and costs which were *necessarily incurred* in order to successfully thwart, or at least minimize, the devastating effects of the individual Respondents' actions to deprive Petitioners of their Constitutional rights. These previously-incurred economic damages are separate and distinct from any attorney's fees that are presently being incurred in connection with this civil action.

More importantly, what the lower courts failed to acknowledge concerning this Court's Opinion in *Steel* was that the respondent in *Steel* asserted that the "investigation costs" were incurred prior to the litigation, which the Court noted would "assuredly support Article III standing" but for the fact that respondent's entitlement to attorney's fees in *Steel* was based on a specific statute that only permitted recovery of the costs of litigation. *Id.* Utilizing the dicta in *Steel*, Petitioners are assuredly entitled to recover the damages they suffered at the hands of the individual Respondents, **prior to <u>this</u> litigation** – which include the attorney's fees and costs that the Petitioners incurred in order to protect their constitutional rights and mitigate their damages.

At the time that Petitioners initiated the underlying civil action, both Petitioners were enrolled as students at TAMU and had contracts to join the United States Marine Corps and the United States Army, respectively, upon graduation. Petitioners suffered significant hardship and incurred numerous expenses, including attorney's fees, litigation expenses and court costs, in order to successfully halt the

blatant due process violations which Petitioners endured at the hands of the individual Respondents acting in their individual capacities. Obviously, a University, a police department, a municipality, or anyone else acting under color of law, has many more resources available to them than the average individual citizen that is being denied due process.

It was clear from the outset that the Respondents' goal in this case was to wear Petitioners down, making it so expensive that Petitioners would have to give up seeking due process. Should the ruling of the Fifth Circuit be allowed to stand, the inexcusable, unconscionable and unconstitutional actions of Respondents will prevail, and all of Petitioners' efforts to make the system work in accordance with the United States Constitution will be for naught. Simply because Petitioners' damages are "attorney's fees", they are not considered recoverable. No such distinction should exist.

Clearly, Petitioners have alleged injuries-in-fact that were directly connected to the due process violations suffered at the hands of Respondents, and there cannot be any serious doubt that a monetary judgment in this case would redress that portion of Petitioners' injuries. Because the due process violations were in the context of judicial proceedings, a lawyer would almost certainly be necessary. Accordingly, Petitioners established an actual injury, which is directly connected to the individual Respondents' due process violations, with a high likelihood that the damages requested in this action will redress such actual, existing, palpable economic injuries. Dismissing the instant case on the pleadings, without affording Petitioners the opportunity to

present evidence and fully litigate this matter, thwarts the statute's purpose.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Ronald G. Hole
Counsel of Record
I. Cecilia Garza
HOLE & ALVAREZ, L.L.P.
P. O. Box 720547
McAllen, Texas 78504
Telephone No.: (956) 631-2891
Telecopier No.: (956) 631-2415
ron@holealvarez.com